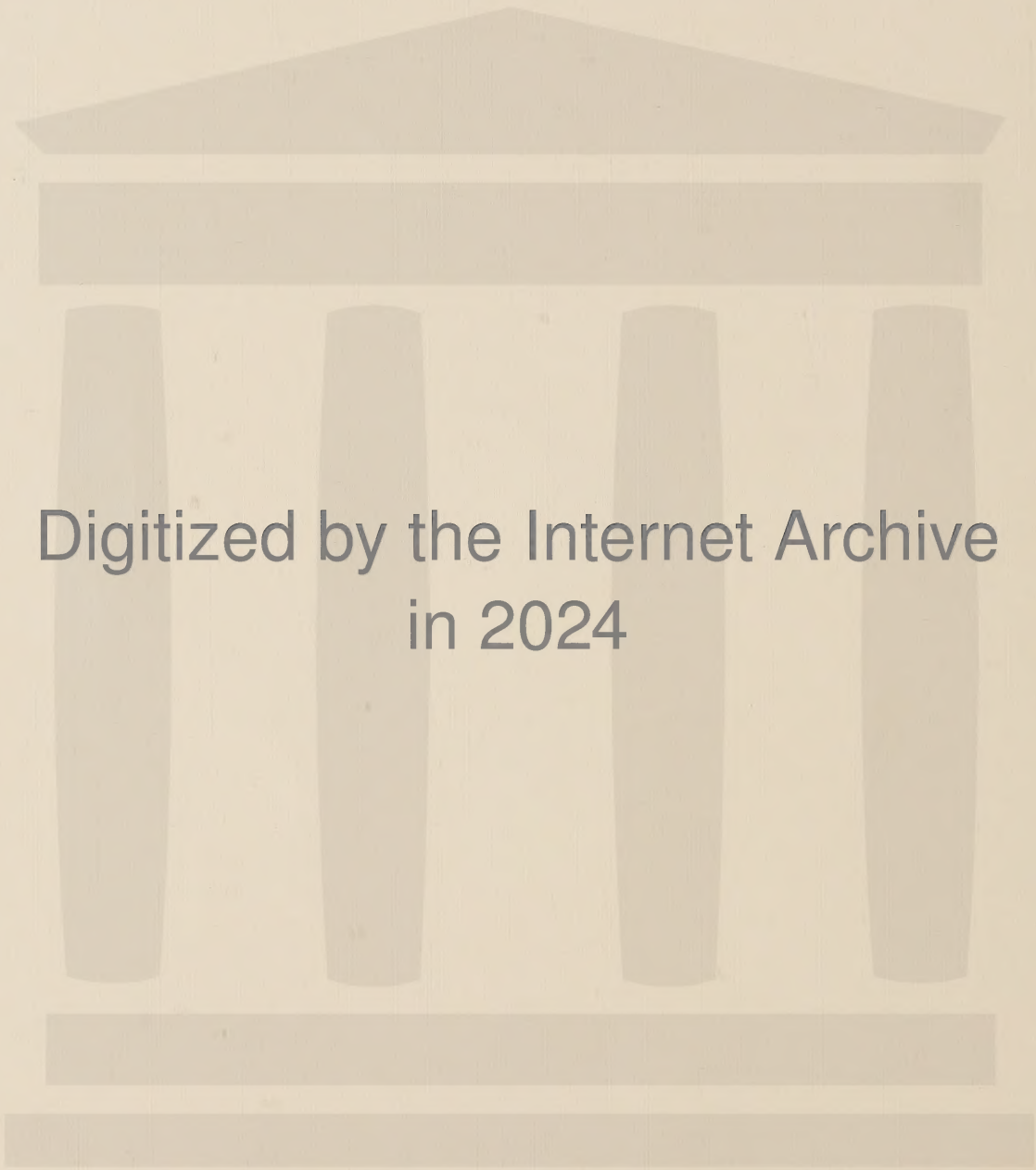
Association of Bay Area Governments Environmental Management Plan

Legal Issues and Planning Process

California Council for
Environmental & Economic Balance



Association of Bay Area Governments

Environmental Management Plan

A Description of the Legal Issues and Planning Process

The California Council for Environmental and Economic Balance

The California Council for Environmental and Economic Balance is a nonprofit organization created to offer programs, coordinate efforts and seek wide support for improving the environment, while maintaining healthy economic growth.

The Council's Board of Directors is composed of representatives from labor, business, industry, education, conservation and other community organizations.

In December 1977, the Council created a special Air Quality Project in the San Francisco Bay Area in order to influence the scope of the Environmental Management Plan prepared by the Association of Bay Area Governments. The Council's effort to expand the role of economic and social considerations in the Plan was successful.

This paper was prepared by Jefrey Loeb, J.D., and partially funded by a grant from the Northern California Construction Industry Advancement Fund. Mr. Loeb is an employee of Solem and Associates, San Francisco.

Summary

On June 10, 1978, the Association of Bay Area Governments (ABAG) completed two years of work on its Environmental Management Plan (EMP). This report describes some of the legal issues evolving from the EMP planning process.

The report begins with a discussion of the federal Clean Air Act as amended in 1977 and the changes proposed by the administrator of the Environmental Protection Agency (EPA). The conclusion reached is that the standards of the Clean Air Act may be overly stringent.

There is also a discussion of some general procedural issues that occurred in developing and adopting the EMP. Several conclusions were evident from the process as a whole:

- The public role was far below the optimum required by sound public policy, although there was compliance with the basic terms of the Clean Air Act.
- Review processes undertaken by local governments were often inconsistent, thus adding to the general public confusion.
- The decision to place the process under the rules of the California Environmental Quality Act, although proper, did little to assist citizen participation or understanding of the process. The paper then discusses the impact of the Environmental Management Plan on the functioning of ABAG.

Substantive issues that came to the fore in the process are also discussed — land use/development strategies and stationary source controls. The major issue of concern to decision-makers was the enforceability of the measures they were required to adopt — not the technical problems involved in finding optimal solutions to difficult problems. In particular, the tendency to look principally to semantic solutions to the hardest issues seems to have characterized the entire stationary source debate. The section closes with a brief discussion of the remaining uncertainties toward land use controls contained in the Clean Air Act.

A discussion of the status of the Plan and lessons to be drawn from this planning experience are outlined. The uncertainties inherent in costly environmental planning after passage of California's Proposition 13 are reviewed along with the Clean Air Act requirement that the Plan have adequate assurances of implementation. The report concludes that the Plan is viable, but financial resources to support it will have to be found.

A summary of five major criticisms of the planning process include:

- The lack of adequate legal and technical guidance by reviewing agencies increased the uncertainty inherent in the Plan.
- Standards for review by local governments were insufficiently detailed.
- There was, at times, a lack of adequate time for review of documents.
- The standards of the Clean Air Act itself may be overly stringent.
- There was a lack of understanding of the standards to be attained under the Clean Air Act.

These criticisms are not meant to be a condemnation of the process. They should be viewed as constructive points that can be used to assist other processes similar to the ABAG planning experience.

Table of Contents

Introduction

On June 10, 1978, the Association of Bay Area Governments (ABAG) completed a two-year work program on an innovative environmental/legal concept: a multi-purpose, integrated Environmental Management Plan (EMP) for the nine-county San Francisco Bay Region. The major planning goal articulated at the outset of the project was to achieve the "greatest possible improvement" in air and water quality; to attain federal and state environmental standards at the "earliest possible date" without undue social, economic or environmental effects.[1]

Of seven plan components, the most controversial and significant was the section aimed at the attainment and maintenance of the National Ambient Air Quality Standards (NAAQS), under the Clean Air Act as amended in 1977 (42 USC 1857 et seq.).[2] The control measures included in the section comprised an "Air Quality Maintenance Plan" (AQMP) (under the 1970 Act). From both an environmental planning and legal standpoint, the AQMP process is most significant. The ABAG experience provides the clearest view to date of the issues that govern air quality management decision-making as mandated under the federal statute.

This paper examines the legal issues as they occurred within the air quality maintenance planning process. It reviews EMP controversies that affected the AQMP, as well as the conflicts in formulation of the air plan itself. The paper is primarily in the nature of a survey due to the fact that there was little substantive law to guide the process,[3] and most of the decisions were made on political (as opposed to policy oriented) grounds. It is not a comprehensive analysis of events or a definitive interpretation of issues. Given the complexity of the process, the discussion divides logically into five separate topic areas.

- An exploration of the Clean Air Act as it relates to air quality maintenance area (AQMA) planning and its operation in this process.
- The structure and basis of ABAG as a planning entity; the plan formation process.
- The impact of state environmental law on the process: the decision to follow the California Environmental Quality Act (CEQA).[4]
- The interface between the federal Clean Air Act and Water Pollution Control Act[5] requirements on the process as a whole.
- The key substantive issues that dominated the process: land use and stationary source controls.[6]

Given an understanding of the process through these separate topics, it is possible to critique the AQMP process as a whole and make recommendations for other areas undertaking such planning.

Significance of the EMP/AQMP

Before proceeding with a general discussion, it is important to understand something of the AQMP's overall significance, as well as the origins of the EMP project. Three key points make the completion of this project particularly important, both as a model for other air planning efforts and as an experiment in regional governmental processes.

First, the AQMP is the first major regional air plan completed since the Clean Air Act was amended in 1977. As such, the AQMP process provides an opportunity to observe the new "rules of the game" after the important 1977 revisions in clean air policy.[7]

Second, the AQMP is the first air plan completed within a coordinated and integrated environmental management plan that sets forth a range of environmental management

proposals. The process thus tests the notion that coordination of planning programs is more efficient and productive of high quality environmental planning.[8]

Finally, the AQMP and the EMP were produced by a multi-jurisdictional governmental entity.[9] Such "councils of government" may provide a viable structure for the resolution of regionwide conflicts over resource management. Commentators have stated that the council of governments (COG) system appears to have potential, yet normally falls victim to several common weaknesses.[10] The existence of an EMP may remedy some of those problems as described below.

In general, then, the ABAG EMP/AQMP process provides an important opportunity for the assessment of planning techniques and results that may be useful in similar efforts around the nation. It should be noted that the legal issues in the planning process proved highly significant in determining the "ground rules" for decisions that were made. In a number of disputes over policy, in fact, legal opinions determined the outcome.

Plan Background

The EMP project was originally funded in early 1976[11] to produce three major products:

1. A series of environmental management plans becoming sub-units of existing regional plans that meet state and federal statutory requirements in specific environment policy areas;

2. An assessment of the environmental, social and economic impacts of the management plans once drafted;

3. A program for continuing planning aimed at the requirements for public participation and on-going planning under both the Clean Air Act and the Clean Water Act of 1976.[12]

The $4.3 million funding for the project was made available by the Environmental Protection Agency (EPA) from the Federal Water Pollution Control Act's areawide waste treatment planning program.[13] As will be seen, the interface between the Clean Air Act and the Clean Water Act forced by the source of the planning funds was an important plan issue.

The Plan itself was to contain seven management programs governing critical environmental areas:[14] surface runoff, air quality maintenance, municipal wastewater treatment, non-point pollution sources, industrial discharges, water conservation and supply, and solid waste treatment. The impetus for the selection of these particular areas was primarily in response to the approach of deadlines for submission of plans to implement federal policies under various statutes. Under both the Clean Air Act and the Federal Water Pollution Control Act, for example, states must produce "implementation plans" that include measures aimed at the attainment of federally set environmental standards.[15] Despite certain overlapping requirements of these statutes, EMP planners recognized early in the process that the bulk of the controversy would focus on the AQMP — and thus on the requirements of the Clean Air Act.

The Clean Air Act

The fundamental goal of the Clean Air Act is to establish mechanisms that will lead to the attainment of air quality standards by statutorily set dates.[16] To this end, a variety of programs are required by the Act, including standard setting programs,[17] planning,[18] implementation,[19] and enforcement responsibilities.[20] In order to understand the legal background of the AQMP, it is necessary to look at the Act from five points of view:

First, the policy of the Act.

Second, the classification of the Bay Region for purposes of the Act.

Third, the requirements for state planning to attain standards.

Fourth, the special requirements for areas which currently do not meet the standards, including permissible extensions.

Finally, the current interpretation of those requirements to meet the 1979 filing deadlines for state quality plans.

POLICY

The policy behind the Clean Air Act is basic and explicit: the rise in pollution due to increased industrialization, urbanization and the use of automobiles constitutes a threat to the public health and welfare that must be remedied.[21] Some commentators have termed the basis for this policy a "no-risk philosophy," implying that the intent of the Act is to reduce to zero the risk of exposure to air contaminants in any region "regardless of whether the same effort would have greater health benefits if expanded in another fashion."[22] Whether or not this claim is accurate, it is true that the Act seems to vest a primary right in clean air in the citizenry.

The Act also sets as basic policy the notion that responsibility for environmental improvement rests in the public sector.[23] Through a system of regulation, enforcement and coordinated research efforts, the level of air pollution should be reduced to acceptable levels through governmental action.

The Act contains a strong policy favoring public involvement in the planning and implemen-

The Act contains a strong policy favoring public involvement in the planning and implementation process. Under Sections 110 (a)(2)(H) and 172 (b)(9) of the Act, for example, implementation plans, to be approvable must demonstrate substantial citizen participation in planning and a public hearing and review process. Similarly, Section 304 of the Act provides for an extensive citizen right to sue both individuals and government for failure to comply with Act provisions. This right has proved to be significant in the last eight years of Clean Air Act implementation.[24]

The final, and perhaps most important policy in this context, is expressed in Section 107 (a): "Each state shall have the primary responsibility for assuring air quality" within its own borders. This policy reflects the congressional determination that in the attainment of air quality standards the federal role is oversight of state efforts and setting of standards, while the state role is implementation of policy.[25] It should be noted, however, that neither this provision, nor the 10th Amendment has been successful in insulating states from EPA intervention despite the potential implications for the federalist system and state's rights. The rationale for this policy flows from a congressional determination made early in the 1970s that states could not (in view of Act history) be expected to both set meaningful standards and enforce them.[26]

BAY REGION CLASSIFICATION: STANDARDS AND NON-ATTAINMENT

The primary tool for the measurement of progress toward the Act's goals are standards set by EPA for air quality on a nationwide basis.[27] The Act specifies several types of standards that must be attained and maintained: ambient air quality limitations;[28] performance standards;[29] and emission standards.[30] These categories, in turn, are divided into primary standards (e.g., health related) and secondary standards (e.g., welfare-related), a distinction which bears on the implementation timetables for the two classifications.[31]

The San Francisco Bay Region has been designated under several types of classifications. Most importantly, because the area does not presently satisfy NAAQS for a number of emittant categories, the region has been classified as a non-attainment area for these

categories.[32] The result of such a classification is to impose extraordinary requirements on the area to attain the standards by target dates ((172)(a)(1)).

At the same time, under the 1970 version of the Clean Air Act, the Bay Region is also classified as an "air quality maintenance area" (AQMA).[33] The classification reflects the fact that the area has a "long-term" air quality problem (10 years, according to regulations).[34]

To satisfy the mandates imposed by both of these air quality designations, the area must implement a plan that will provide for fulfillment of different requirements.[35]

IMPLEMENTATION PLANS

The threshold requirement in fulfillment of the policy that states have the primary implementation responsibility for the attainment of NAAQS is the state preparation of a plan which "provides for the implementation, maintenance and enforcement of such standards in each air quality control region...."[36] This State Implementation Plan (SIP) must be submitted to EPA by January 30, 1979 or the administrator will be compelled to apply a specific set of remedies and/or sanctions to the state.[37] The SIP is, from a practical standpoint, the coordinative mechanism for the integration of local, state and federal efforts to attain and maintain standards for each designated air quality area within a state.

There are eight basic requirements for an approvable SIP.[38] One of the major problems during ABAG plan formulation was the breadth of these provisions, and a critical lack of adequate guidance as to their interpretation. The basic implementation plan must contain the following:

1. Emission limitations, schedules and timetables for implementation. This includes transportation controls, air quality maintenance plans and preconstruction review of direct sources of pollution.[39]

2. Provisions for systems to monitor and analyze the state of ambient air quality within the control region.[40]

3. Provision for control programs for stationary sources in non-attainment areas (see below).[41]

4. Provision to prevent any stationary source in the state from emitting any pollutant in amounts which either prevent attainment or maintenance of standards, or degrade air quality in regions where the standard is met.[42]

5. Adequate institutional and financial assurances that the state will carry out the plan.[43]

6. A program for control of mobile source emissions in non-attainment areas (see below).[44]

7. Mechanisms for revision of the plan as necessary to account for changes in standards and technology. This includes a public participation unit.[45]

8. After June 30, 1979, no major stationary sources can be constructed or modified in a non-attainment area unless a specific type of plan is approved and in operation (see below).[46]

Given this background, it should be stressed that the AQMP is, in its most critical sense, the basis for the Bay Region section of the California SIP. This conforms with a California Air Resources Board (CARB) determination that regional agencies will prepare air quality plans, with the state performing an oversight function similar to EPA on the federal level.

The Bay Area is, as stated above, primarily a non-attainment area. It is important to consider the specialized requirements for non-attainment implementation plans.

NON-ATTAINMENT PLANNING

Under the Act, the highest state priority is the implementation of a plan that will ensure that

all areas within the state attain NAAQS for all categories of emittants.[47] Non-attainment areas under this system may face the need to adopt extraordinary measures in order to reach attainment by the statutory date of 1982.[48]

Under Section 172 of the Act, the basic requirements for non-attainment areas are set forth. Those include the implementation of measures to attain standards "as expeditiously as possible" but in no case later than the target date of 1982.[49] In certain cases, an extension is possible (see below) for two types of emittants where the state can make a showing that attainment by 1982 is not possible.[50]

The basic requirements for non-attainment include:

1. The implementation of all reasonably available control measures as expeditiously as practicable.[51]

2. A requirement that the area show reasonable further progress toward the attainment through — at a minimum — the application of reasonably available control technology. Reasonable further progress is defined under Section 171(1) as "annual incremental reductions" toward attainment.[52]

3. A complete inventory of emissions from all sources.[53]

4. Identification and quantification of the emissions that will be allowed to result from the construction and operation of major new or modified stationary sources.[54]

5. Permit programs for the construction and operation of new or modified major stationary sources.[55]

6. Identify and commit financial and institutional resources necessary to carry out the plan.[56]

7. Contain timetables for implementation and schedules for compliance.[57]

8. Evidence public, local government and state legislative involvement.[58]

9. Evidence that the state, the local governments and other necessary agencies have adopted by "statute, regulation, ordinance or other legally enforceable document" the necessary requirements for compliance.[59]

Clearly, the key requirement is that all necessary steps be taken as "expeditiously as possible" in order to guarantee attainment by the target date.

EXTENSION REQUIREMENTS

In the case of photochemical oxidants and carbon monoxide, the statute admits the possibility that attainment may not be possible by 1982.[60] The Bay Region made such a determination prior to the formulation of the AQMP and thus the Plan had to demonstrate the facets required for a non-attainment plan extension. The primary requirement is showing that "despite the implementation of all reasonably available measures," attainment will not be possible.[61]

Should the state be able to make such a showing, then the Plan must demonstrate three additional requirements in order to qualify for the extension:

First, the Plan must evidence a program which requires, prior to the issuance of a permit for the construction or operation of a facility, an analysis of alternate sites, sizes and plant facility types, and that the benefits of the proposed source "significantly outweighs the environmental and social costs" imposed as a result of location.[62] Some commentators have identified this as an "industrial siting program," although the basic requirements of the Act do not specify that there must be any coordination of site classification and selection.[63]

Second, the Plan must establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program.[64]

Third, the Plan must identify other measures necessary to provide for attainment of the applicable ambient air standards not later than December 31, 1987.[65]

It should be noted that the final AQMP, while complying with the bulk of these requirements, did not completely deal with the full range of emittant-specific requirements for the regional non-attainment plan. Several omitted categories were left reserved for modification prior to submission of the final document to the EPA.

ENFORCEMENT

No discussion of the Clean Air Act would be complete without a brief mention of the enforcement powers granted EPA and the citizenry to ensure strict compliance of statutory provisions. Three major areas stand out as enforcement provisions of the Act.

First, should a state fail to submit an acceptable SIP, the EPA Administrator is required to promulgate an alternative SIP, subject it to public hearing and implement it as though it were state-originated.[66] The state must enforce this SIP despite the lack of voluntary assent to the provisions of the Plan.[67]

Second, should the state fail to submit an acceptable SIP, no new major stationary source may be sited, modified or operated under Section 110(a)(2)(I). This follows in a non-attainment area where the siting would contribute to a violation of NAAQS.[68] This is tantamount to a "no-growth" policy for most major industrial areas, especially in non-attainment areas where siting would contribute to a violation of NAAQS.

Third, if an acceptable plan has not been approved, or if its provisions are violated, the administrator can cut off any federal funds for sewage and waste treatment projects as well as highways and housing monies.[69] This is a major factor for most municipalities in both their urban development programs and in their ability to cope with existing needs.

Also, the administrator has broad redress to the courts to enforce orders, including administrative, civil and criminal remedies in appropriate cases.[70]

Should the administrator fail to enforce any non-discretionary duty under the Act, or a private citizen act in violation of an implementation plan, there is a broad citizen right to sue in federal court to compel redress of the violation.[71] This has, as stated earlier, proven to be the most significant testing ground for Act provisions and EPA authority.

SOURCE OF CONFUSION: 1977 AMENDMENTS

Adding to the ambiguous nature of the requirements noted above was a series of modifications that occurred in the statutory framework midway through the ABAG planning process. In 1977, the Clean Air Act was modified to reflect a more aggressive viewpoint of air quality program needs. Despite a general toughening of the Act, there were several modifications that affected provisions which had been extremely controversial. The affected provisions were:

1. A requirement that the SIP contain measures to control land utilization and development to maintain air quality benefits.[72] This provision was wholly deleted and the Act is presently silent on the inclusion of such controls.

2. A requirement that the Plan must contain indirect source controls (i.e., those sources such as shopping centers which give rise to pollution generated by motor vehicles). This provision was also deleted and an express prohibition against EPA mandating their inclusion in an SIP was written into the statute.[73]

3. A provision requiring a parking surcharge and control strategy. This provision was deleted with a prohibition against EPA requiring such a mandated provision for SIPs.[74]

The net effect of the 1977 amendments as a whole was to strengthen the requirements of

the Act, with particular emphasis on stationary source controls, mobile source controls and transportation control strategies. Despite this, it is interesting to note that the most controversial provisions in the ABAG planning process revolved around land use controls and transportation strategies. One major reason for this was uncertainty about the meaning of the Act's post-1977 silence on the land use/control issue.

1979 SIP GUIDELINES

One of the major factors in the confusion about the requirements of the Clean Air Act was the failure of EPA to issue updated regulations that incorporated the 1977 changes in the Act.[75] Decision-makers, seeking to assess the impact on the approvability of the Plan by incorporation or deletion of a particular control strategy, had no way of determining with any certainty EPA's criteria for review. Midway through the process, a set of SIP Guidelines was issued that attempted to set many of the questions to rest.[76] The Guidelines unfortunately did not answer a number of critical questions, adding instead to the confusion of the ABAG process. It is worthwhile to review the Guidelines both in terms of the impact of the AQMP and General Plan requirements.

The initial point in the Guidelines is that EPA will not generally question state determined emissions growth rates so long as the state is able to demonstrate "reasonable further progress."[77] Nonetheless, this policy is qualified by EPA's statement that strict compliance with deadlines will be required and states are to examine "ambitious alternatives" (particularly in transportation control strategies) in achieving oxidant and carbon monoxide standards.[78] Significantly adding to the confusion was a statement by the administrator in the cover letter to the Guidelines that indicated that the 1970 regulations for the Act would remain in effect despite the 1977 amendments.[79] The confusion was justifiable in that the Guidelines, while indicating a set of requirements for state implementation, did not reflect changes in EPA's ability to mandate the control strategies discussed in the section above.[80]

Beyond these basic points, the Guidelines spelled out a number of requirements, some of which are duplicative of the Act itself:

1. A geographical definition of all state non-attainment areas.[81] States are advised to follow A-95 (see below) guidelines in designating these geographical areas; there was a clear attempt to strengthen regional coordination through this process.

2. Inventory of the emissions of a given area.[82]

3. Controls that will attain NAAQS by 1982 (or justification for an extension for two categories of emittants).[83]

4. Adoption of all legally enforceable measures to attain NAAQS by statutory dates. This must include evidence that all levels of government have adopted by statute necessary measures.[84] This provision is especially interesting in light of the questions raised by the passage of California's property tax limitation initiative (Proposition 13).[85] Another major open question is when such measures must be adopted.[86]

5. Reasonable further progress toward attainment by non-attainment areas, including the imposition of transportation controls as necessary to show attainment by statutory deadlines.[87]

6. Identification and quantification of planned emission growth, including the permissible increment allowed from the construction of major new or modified stationary sources.[88]

7. Provision for an annual report on the status of ambient air quality and progress toward attainment.[89]

8. Preconstruction review and permit programs for new or modified major stationary sources for non-attainment areas.[90]

9. Identification and commitment of the financial and institutional resources to carry out the Plan.[91]

Additionally, the Plan must also evidence public, local government and state involvement in Plan preparation. Alternative measures must be examined and their costs estimated. The Plan must also show that it was adopted after reasonable notice and public hearing.[92]

The Guidelines specify several other criteria for approval of an SIP extension for oxidants and carbon monoxide:

1. Allow for permitting of stationary sources on a cost (health, welfare) vs. benefit basis.[93]

2. The state must commit itself to public transit improvement.[94]

3. The state must commit itself to an inspection and maintenance program for mobile sources (i.e., automobiles).[95]

4. The Plan must commit itself to use any federal funds received for environmental efforts in a way that will not interfere with implementation of the SIP.[96] This includes coordination with outputs by state transportation planning[97] and state housing planning.

The Guidelines also detail a number of pollution specific criteria for SIPs.[98] In this, non-attainment areas must use the "worst case" as the point to begin analysis for the entire controlled region, rather than a regional average. The stringency of this requirement is clear, although recent EPA policy seems to allow for "clean pocket" siting (even though the "worst case" would not allow a given stationary source to be permitted).[99]

The Guidelines made the puzzling statement that states seeking an extension must include an explanation of long-range growth patterns along with a consideration of alternative growth strategies to "modify total travel demand." This statement would appear to exceed the authority of EPA after the 1977 amendments, which deleted EPA's ability to mandate land use/development controls.[100] This point is discussed at length below.

COMMENT

Although these Guidelines leave unanswered questions, one point clearly emerges from this cursory view of the Act: to satisfy the Guidelines requires the imposition of extremely strict measures by all states with non-attainment areas. The reopening of the land use controversy would seem to conflict with Congressional intent to delete the EPA authority over this particular control measure as well as those relating to indirect sources.[101] However, until the Guidelines are published as part of the regulations, the extent that these statements will become established law is uncertain.

From a regional coordination standpoint, it is interesting to note the Guidelines stress integration of Plan measures, growth projections and implementation with other federal/regional legislative requirements. This includes integration with the Department of Transportation planning and programming procedures,[102] Areawide Waste Treatment Planning, the Federal Water Pollution Control Act of 1972, Section 208 as amended by the Clean Water Act of 1977, and the Department of Housing and Urban Development (HUD) comprehensive housing planning under Section 701 of the Housing Act of 1954.[103] This may imply, in some cases, the creation of a "Unified Work Program" as required for transportation planning, or coordination with the HUD Comprehensive Planning Assistance Program (HUD Section 701).[104] State growth rates, as planned for in the SIP, must be consistent with the growth rates "used (or implied by) other planning programs."[105]

Beyond the coordination issue, this overview of the Clean Air Act leads to several observations about the Act's functions in the general planning process.

First, there is a general need for complete regulations updating the provisions in the Act, and clearly outlining what is required of states to meet those provisions. Broad discretionary

powers on the part of the EPA Administrator should be refined so as to ensure a degree of certainty in the planning process undertaken by states.

Second, the time deadlines for attainment of standards may not be reasonable. In some regions of the country, even a complete shutdown of industry today would not yield a 1982 attainment across the board, nor complete assurance of 1987 attainment.[106] States, in cooperation with EPA, should decide on what constitutes reasonable progress toward reasonable attainment deadlines.

Finally, it is questionable whether an overly stringent or ambitious plan will be implemented in a timely fashion. Congress should consider relaxation of the time deadlines and enforcement sanctions to provide for a more reasonable implementation program. The result, otherwise, may be a poor state performance in implementing mandated policies.

With this analysis of the Clean Air Act in mind, it is appropriate to look at the agency delegated with responsibility to develop the Air Quality Plan for the Bay Region: the Association of Bay Area Governments. It will then be possible to look at several specific procedural and substantive issues that emerged in the ABAG planning process.

ABAG: Organization and Plan Formulation

ABAG is a voluntary association composed of local governments from the nine-county San Francisco Bay Region. It is a "council of governments" and has a structure reflective of that description.[107] The AQMP/EMP decision-making and plan drafting process was conducted in a multi-phased hearing structure with responsibility for formulation and revision divided among three policy committees. Final approval power was vested only in an assembly of delegates from member governments to the Association. Those bodies are described as follows:

1. Environmental Management Task Force (EMTF)[108]

The primary authority for plan formulation was vested in a body composed of both elected officials and private citizen representatives of particular segments of the population. The EMTF responsibility was to develop a draft plan that could serve as the basis for a final plan. The role of staff was to determine the specific technical options and evaluate them, while the EMTF was to "judge this information and to select the best course of action."[109]

Early in the EMTF program, a decision was made that the complexity of the subject matter precluded EMTF development and consideration of the Plan on a control measure basis. The decision was made to ask staff to compile a "laundry list" plan that could then be considered by the EMTF on an item-by-item basis.

Significantly, once the draft document was written, a number of ABAG delegates began to refer to it as the "Plan," rather than a "set of options."[110] Although this was not a surprising outcome, it was clear that the flow of debate for a period of time was restricted by normal concern with a plan which claimed to be fully integrated and in which the deletion of a specific item would result in the need for a complete Plan rewrite. Under substantial political pressure, a number of changes were, in fact, accepted in order to secure Plan approval.

It should be noted that the EMTF members were each financially compensated for attendance at meetings.[111] In a sense, this represents one variation of the concept of financed public participation in governmental proceedings. As an experiment in this kind of participation, it appears to have had limited success. Although individuals selected may have superficially met criteria as representing special interest groups in the population, the fact that they were not directly selected by organizations or interests in those populations appeared to limit their effectiveness. The result of this was a body that looked good on paper in its ability to communicate with the affected constituencies, but in practice failed to effectively

do so. This communicative function was theoretically a significant justification for the constitution of the EMTF itself.[112]

2. Regional Planning Committee (RPC)[113]

After the EMTF completed and approved its recommendations for the Plan, the next policy committee in the process was the RPC. This body had on-going responsibility for management of comprehensive regional planning under a plan drafted early in ABAG's history. In the review of the AQMP — and the EMP — the RPC role was limited to reviewing the proposals for consistency with this regional plan. In practice, the RPC had little impact on either the policies or the political forces shaping the Plan. RPC does, however, have on-going project review functions under the A-95 program discussed below.[114]

3. Executive Board[115]

The final policy committee throughout the process was the on-going administrative committee of ABAG — the Executive Board. By the time the Plan reached this committee, most substantive decisions had been reached on the Plan, and the major role was to examine new language to determine its conformance to the compromises that had been made. The body is composed solely of elected officials, with no special district representatives. The Executive Board did have one important function in that it conducted the last public hearing on the Plan.

4. General Assembly

The General Assembly was the body charged with final approval of the Plan. Because a decision was made to place the Plan under CEQA (see below), the Assembly had almost no ability to modify the document once it was received.[116] Delegates to this body were generally instructed (although not universally) to vote by their councils or board, and the only votes possible were on issues that had been previously considered and taken through the complete hearing process. Interestingly, the Assembly reflects a bi-cameral nature formed of lower houses (city councils) and upper houses (boards of supervisors). Approval of the Plan required an affirmative vote of both sets of representatives.[117]

AUTHORITY

The major authority ABAG has to implement any of its regional plans derives from voluntary management agreements signed by affected local government agencies.[118] It is only by mutual agreement (and subsequent state concurrence, in some instances) that ABAG retains any ability to achieve implementation of programs. Thus, the EMP was formulated by a cooperative agreement between ABAG, cities, counties, special districts and regional single purpose agencies.

Supporting the general ABAG voluntary authority over the EMP process was the fact that the State designated ABAG as the lead agency for regional water and air planning.[119] The requirements of consultation with other special units is present, but the point is that ABAG retains a measure of authority over on-going EMP implementation and coordination by virtue of these designations. The major importance of this discussion is to point out that ABAG functions as a multi-purpose, multi-jurisdictional agency close to the model of a "regionwide governing body."[120] The advantages and disadvantages of vesting the organization with this kind of planning authority (although implementation must still be left to other governmental entities) influenced the political background of the EMP review process.

The fact that the Plan was successfully completed is one indication that such a governmental structure can function effectively.

ABAG FUNCTIONS

Because of its voluntary nature, the Association has only exercised a limited number of

governmental functions in the regional area: mostly in the performance of evaluative studies to assist local planning efforts.

In understanding the nature and effect of the EMP passage, it is helpful to inventory ABAG's present functions and speculate as to the possible effect on these functions through the existence of a comprehensive environmental plan.

Under its present structure, ABAG has three major planning functions:

A-95

First, the organization is the A-95 review agency for the region. Under the terms of the Office of Management and Budget Circular, A-95, identified agencies (state, regional and local) are given the ability to comment on any proposed project within their jurisdiction that requires federal funds.[121] The program requires that an applicant for grant funds must notify a designated planning agency, and that notice must contain a description of the project, its location and whether an environmental impact statement will be necessary.[122] The designated planning agency is required under the A-95 process to make recommendations "for the purpose of assuring maximum consistency of such project with state, regional and local comprehensive plans."[123] The A-95 agency must also notify within 30 days other interested governmental agencies, thus allowing them time to take any action on the project that is required.[124]

Although A-95 has strengthened the planning/communications network between various governmental entities, it has been criticized for its inability to provide reconciliation of conflicts between levels of government. As one commentator has stated, "...the A-95 clearinghouse is often a council of governments, dependent for its very existence upon the functions of the local government units whose projects it is supposed to review."[125]

A-95 EFFECT ON THE EMP

It seems evident that the existence of a comprehensive enforceable regional management plan provides a far stronger base for the working of the A-95 review process. Most importantly, the fact that the EMP was a coordinated effort among governmental agencies meets the strongest criticism of A-95 review functions — failure to achieve a viable means for inter-governmental conflict resolution. Thus, the EMP will serve to strengthen this federal coordination program.

CLEARINGHOUSE FUNCTION

A second ABAG function is to serve as a clearinghouse for regional permit applications and review. To a major extent, this follows in part from the A-95 function, detailed above. Equally important, however, is the circulation and dissemination of information about regional planning needs and positions. This involves the compilation of documents about regional problems of widespread interest. The ABAG clearinghouse function is also provided for under both the California[126] and the National Environmental Policy Acts[127] in the circulation of documents.

COORDINATIVE EFFECTS OF THE EMP

Although the A-95 review function will be strengthened as noted above, it seems clear that the existence of an areawide environmental management plan will be of particular benefit in assessing regional information needs. The existence of centralized information gathering and analysis systems (as required by both the Clean Air Act[128] and the Clean Water Act)[129] can only support the research process.

REGIONAL PLAN

The final major ABAG function is the drafting and maintenance of a comprehensive regional growth plan. Although this plan represents merely an "optimum" view of the growth and

development of the region, it does not have the specific detail of the EMP as it is not, for the most part, concerned with the attainment or maintenance of standards. As stated above, the EMP was designed as a sub-unit of this overall plan.

PLANNING EFFECT OF THE EMP

The existence of a comprehensive management plan that details resource management, rather than the development of optimum regional predictions, will affect the regional General Plan in several important ways. Most importantly, it will give regional decision-makers a far more defined standard to judge local resource management decisions. This will strengthen the review procedures conducted on the basis of the EMP (such as A-95). The existence of a plan aimed at specific standards will have the effect of forcing the planning process to follow predetermined management policies and require decision-makers to choose options based on known criteria.

Additionally, although the EMP is in theory the sub-unit of the regional General Plan, it is clear that the EMP will serve as the key guidance document for future areawide planning (as it was intended). The mandate and impact of standards (along with sanctions for failure to comply) will thus become the key point of consideration in the decision to allow differing resource management patterns. The EMP will become the operative plan for economic, social and environmental regional activity.

As can be seen from this summary, the major effect of the EMP will be the clarification and strengthening of the regional planning management process. It will have the additional impact of involving ABAG in an important coordinative role for resource management decisions in the future.

PROJECT FUNDING

As was stated at the outset of this section, the EMP project was funded by the EPA through a grant under Section 208 of the Federal Water Pollution Control Act. A brief look at the requirements of that statute completes the discussion of the role of ABAG and the important statutes related to development of the EMP.[130]

The major purpose of these Section 208 grants is to encourage and facilitate the development and implementation of areawide wastewater treatment planning procedures. To this end, the statute lays out a system similar to the structural description of air quality planning under the Clean Air Act.[131] This includes: designation of wastewater treatment planning areas;[132] identification of treatment works "necessary to meet the anticipated need;"[133] implementation of adequate institutional measures necessary to ensure that plans will be carried out;[134] pre-construction review of facilities for their wastewater effect;[135] identification and inventory of the wastewater problems of present and proposed facilities;[136] and EPA supervision of a state implemented program.[137] Grants are made available to assist in any and all of these functions.[138]

The Act does not make express provision for the use of funds to engage in comprehensive environmental planning. In fact, this has led to litigation challenging the validity of the process as a whole (as below).[139]

Technical planning considerations aside, the interface between the Clean Air Act and the Clean Water Act was important for two key reasons:

First, the deadline for submission of the actual 208 Plan itself was substantially before any other subject area plan was due.[140] To an extent, this set overall time parameters on the project as a whole.

Second, the requirements for public participation under the 208 process (especially in the area of continuing planning required under both the air[141] and water statutes[142]) are far more detailed under the Water Pollution Control Act than under the Clean Air Act. Since the EMP was an integrated plan, a decision had to be made whether to comply with more stringent

requirements of particular statutes for common points — or to create separate procedures to minimize these problems.

The conclusion was logical in the context of the commitment to on-going, continued planning. Plan requirements were merged at common points, with the more stringent requirements prevailing.

AQMP Procedural Issues

Having set out the statutes, guidelines and structural framework in which the AQMP was drafted, it is appropriate to look at several of the key procedural issues in the Plan. Five areas appear to merit attention:

1. The decision to place the process under CEQA.
2. The controversy over the use of 208 funds for the project.
3. The public's right to notice of hearings and participation.
4. The guidance obligation of state and federal agencies.
5. The problems of local development and review standards of the Plan.

California Environmental Quality Act

A key decision made early in the process by ABAG leadership was that the process should follow the requirements of CEQA.[143] Although this decision did not prove outcome determinative, this use of CEQA had several significant aspects.

CEQA, modeled after the National Environmental Policy Act (NEPA), specifies the procedural requirements for the review and approval of proposed plans, projects and developments with an "environmentally significant" effect.[144] In a number of ways, CEQA follows the NEPA lead and courts have stated that, where possible, the California Act is to be interpreted to follow the national statute.[145]

Under CEQA, any private or governmental activity defined under the Act as a "project" must be reviewed in accordance with a specific set of procedures,[146] to determine the environmental effect;[147] the preparation of an Environmental Impact Report (EIR);[148] public notice and hearing procedures;[149] and, coordinated review among "responsible" agencies.[150] CEQA, recently amended to more sharply focus the responsibilities of agencies in carrying out its terms, also sets stringent time limits for review and citizen court challenge.[151] The time limit feature and the required public notice provisions were probably the most visible aspects of this legislation during the AQMP process.

The major question is whether CEQA was required at all for this process. At first glance, it would appear that the EMP was simply a proposal for action, without any measurable impact on environmental quality of the type that would require a CEQA governed process. The answer to this question lies in the definition of a project under the statute.

Section 21065 of the California Public Resources Code defines "project" as follows:

1. Activities undertaken by a public agency;
2. Activities undertaken by a person supported financially by public agencies;
3. Activities involving the issuance to a person of a lease, permit, etc.

Under the provisions of the public activity definition of a project, it would appear that an environmental plan would be an activity under CEQA. However, Section 21080 requires agencies to file a declaration either finding a "significant adverse effect" on the environment, or explaining why an EIR is unnecessary.

The need for CEQA in the EMP process is thus unclear. The Plan, once drafted, was primarily a speculative document. In order to take effect, it would have to be approved by state and federal agencies. Furthermore, the "adverse impact" requirement of Section 21068

would not seem to be met for this type of project. The aim of the Plan was to improve environmental quality, not to "adversely" affect it. Under this view of the threshold CEQA requirements, it would appear that the EMP should not have followed this statutory procedure.

The case law does not appear to support this view. One recent case, *Edna Valley Association v San Luis Obispo County and City Planning Coordinating Council,* is directly on point.[152]

The case arose around the submission of a proposed local transportation plan by the state for inclusion in the California Transportation Plan.[153] The argument was made, (and endorsed by the planning agency), that CEQA did not apply since the action was wholly prospective and the state board would subsequently act on the plan.[154] The argument followed that this plan fell under the exception granted by CEQA for legislative proposals.[155]

The Court, however, did not agree with this view and instead held that this was, in fact, a "project" within the meaning of the statute. The reasoning went off on the broad reading of the Act required under *Friends of Mammoth v Mono County.*[156] Under that view, the Courts have held that CEQA is to be interpreted so as to afford the "fullest protection to the environment."[157] Given this reading, then, an "activity directly undertaken" should be read to include such activities as the formulation of a transportation plan.[158] Similarly, although CEQA grants specific exemptions for legislative proposals, the Court held that this plan did not fit the description since the proposal had not been submitted to the legislature.[159] Thus, the plan was a "project" and would require application of CEQA time limits absent another exemption.[160]

The application of the above to the ABAG EMP is clear. The conclusion is that CEQA did apply to the process. Buttressing this view is the notion that regardless of the state acceptance or rejection of the plan (or parts thereof) the EMP will still regulate ABAG's internal decision-making with regard to its own regional plan.

Thus, it appears that CEQA does apply in the drafting and consideration of complex environmental plans. The possibility of an analogous NEPA requirement, however unlikely, bears investigation.

CEQA'S IMPACT ON THE PROCESS

As stated above, the use of CEQA procedures had little impact on the process, if for no other reason than it was simply another incomprehensible set of requirements as far as most delegates and ABAG decision-makers were concerned. The EIR contained little analysis other than that in the EMP itself. It was characterized by statements indicating that since the Plan was self-mitigating for environmental damage, no consideration of alternate measures would be necessary. This is not to say that the EIR was inadequate — indeed, another lengthy document would probably have received little attention from any of the parties concerned with the Plan's development.

Beyond this, however, it seems clear that the real impact of CEQA on the process was to lock in Plan development along a set timeline. The net effect may well have been to avoid additional debate at certain points in the discussion. At the General Assembly meeting, for example, one proposal was ruled "significant," but because it had not been raised during the hearing process, ABAG counsel stated it could not be considered by the Assembly.[161] Similarly, CEQA limits time for court challenge, and thus had the effect of limiting the availability of court determination of controversial points.[162] In fact, a final copy of the Plan was not available within the time allowed for court challenge under the law.

Recognizing the non-controversial nature of the Plan in its later stages, it seems clear that the role of CEQA limitation in the process should not be overstated. Yet, had circumstances varied, it is possible that CEQA might not have had an effect contrary to its main purpose: to

assure the accountability of decisions affecting the environment by fully exposing the decision-making process to public scrutiny and participation.[163]

Use of 208 Funds for a Comprehensive Plan

With the exceptions listed above, the role of independent Federal Water Pollution Control Act requirements in the AQMP formulation was minimal. One issue that did arise was related strictly to the use of Section 208 funds for non-water quality related issues. In the context of a national thrust toward coordinated planning, it is worth examining the issue. Clearly, the outcome of the controversy will bear sharply on the future ability of ABAG — or EPA for that matter — to implement the kind of integrated efforts resulting from comprehensive, multi-purpose plans.

GONZALES v COSTLE [164]

This issue has been raised in a court action that places a group of elected officials, former elected officials and private citizens in opposition to ABAG, the State of California and EPA. The substance of this case is that Section 208 grants are wastewater treatment planning funds, not comprehensive planning funds and, therefore, the use of them for the latter purpose is unlawful.[165] This allegation breaks down into three specific contentions:

1. That ABAG was not a proper agency to be designated for 208 planning by virtue of its initial lack of water district participation.[166] This cause of action was subsequently dropped for mootness when the EMTF was constituted to include water agency members.

2. Use of 208 funds for comprehensive environmental planning (especially air planning) exceeds congressional intent and therefore violates applicable federal law.[167]

3. ABAG did not engage in the proper accounting procedures and EPA did not appropriately review and require compliance with mandated auditing procedures.[168]

For the purpose of this discussion, it is the second cause of action that draws attention.

PLAINTIFF'S CASE

The essence of the Plaintiff's case rests on a contention that Congress enacted the Federal Water Pollution Control Act of 1972 for the sole purpose of "restoring and maintaining the nation's ***waters***" (emphasis added).[169] It was thus Plaintiff's belief that "clean water and clear water alone is the Act's sole object."[170]

Within this context, the argument holds that the purposes of 208 funds are restricted to planning for upgrading existing wastewater treatment systems and construction of new treatment plants — not comprehensive environmental planning.[171]

Plaintiff then turns to a construction of Congressional intent. The argument is that Congress, in the absence of an expression of intent to permit use of funds variant from Act purposes, cannot be held to have authorized such use.[172] To support this contention, they point to the lack of Congressional intent in either the statute or the hearing record. This absence of intent is in contrast to other environmental statutes which expressly authorize coordination and integration of planning with other programs.[173]

Plaintiff also looks to ***NRDC v Train*** to demonstrate that the Act's only aim is clean water.[174] In that case, Plaintiff NRDC alleged that the intent of the Federal Water Pollution Control Act was undermined by EPA regulations granting a degree of flexibility in the application of the statutory scheme by states.[175] The Court, agreeing with Plaintiff, interpreted the Act as explicitly calling for "restoration and maintenance of waters..." by 1983, so they would be suitable for human consumption.[176] Equally important for the *Gonzales* Plaintiffs, in *Train*, the Court held that the method for interpretation of the section should revolve around a

reading of the "particular statute...in the context of the entire Act so that its purpose may be effectuated." Thus, the Court felt that "...Section 208 is a critical provision in a broad, far-reaching Act....The section is also intended to coordinate and integrate other planning...*provisions of the Act.*" 33 USC 1288 (emphasis added).[177]

This lack of intent requires, in *Gonzales* Plaintiffs' view, the conclusion that non-water quality related use of 208 funds is improper. The fact that significant 208 funds were used for non-wastewater treatment planning should be considered *per se* unlawful.

Supporting this view is the leading case on permissible use of federal funds, *Valley Construction Company v Hoffman* 417 F. Supp. 926 (1976). The express holding of that case is that "sums appropriated by Congress must be applied solely to the object of such expenditure, and appropriations not used for the specific work designated by Congress cannot be used for any other purpose."[178]

Finally, *Gonzales* Plaintiffs conclude their argument by pointing out that even if a limited right to coordinate comprehensive planning efforts is permissible under the statute, ABAG exceeded the administrative mandate for use of the grant funds. The brief quotes a memorandum authored by the State Water Resources Control Board, holding that support to non-water quality comprehensive planning elements under 208 should be limited solely to the development of a common data base and a comprehensive assessment of environment impacts of 208 alternatives.[179] This would preclude use of such funds for the general planning effort undertaken by ABAG.

EPA/ABAG ARGUMENTS

In a joint trial brief, Defendants in the *Gonzales* case offer a different view of the purpose of Section 208 and the freedom it grants the EPA Administrator to use the funds for coordinated planning efforts. The basic point of Defendant's case is that Section 208(b)(2) does not limit the range of activities that may be included under an Areawide Wastewater Treatment Planning Program. The statute itself reads: "Any plan prepared under such process shall include, *but not be limited to...*" (emphasis added) Waste Water Treatment Plans.[180] The fact that this disclaimer of limitation is present is the lynchpin of the Defendant's case to negate the Plaintiff's contentions of lack of legislative intent.

To support this interpretation, Defendants look to Congressional hearings on the 208 program in which the author of the measure stated that such planning efforts will "assure that measurable progress will be made both with improved water quality and enhancement of interrelated areas of the environment...."[181]

The EPA/ABAG argument also draws strongly on two related public policy considerations. First, the "only sensible way to carry out planning under 208 is to integrate and coordinate water quality plans with other kinds of environmental quality planning."[182] Second, "because the concept of 208 areawide planning and AQMA planning dovetail so closely (in terms of similarity of approach and structure), integrated planning efforts are a necessity if either process is to be wholly successful."[183] This view is supported by the requirements of both the California and National Environmental Policy Acts which mandate environmental impact statements that include 208 program environmental effects and alternatives.[184]

Defendant's case also goes deeply into issues of standing and mootness which are unimportant in this discussion.[185]

COMMENT

The outcome of this case may have significant ramifications in several key areas of environmental policy, aside from its direct impact on ABAG and the potential limitation of the availability of 208 funds for comprehensive planning programs. If nothing else, it would stand as a

rare instance where the ability of EPA to act in favor of the environment as a function of the administrator's discretion was limited.

Similarly, such a restriction could cast a shadow on the future progress of comprehensive planning, given continued silence of Congress in expressing an intent to fund such programs.

Although a prediction as to outcome would be inappropriate, two factors which balance against each other may prove critical:

First is the traditionally broad discretion granted the administrator of EPA over programs such as Clean Air and Clean Water Acts.

Second is the inherent danger in granting overly broad authority to federal bureaucrats to authorize expenditures not clearly contemplated by Congress.

An adverse ruling for Defendants will have severe and potentially disastrous effects on ABAG's ability to survive. Although the specific remedy to be fashioned has not yet been fully explored, the range of alternatives flow from "tracing the funds" under a trust theory to the invalidation of the EMP as a result of unlawful expenditures.

Public Participation in the Process

Both the Clean Air Act and the Clean Water Act mandate a substantial public role in areawide planning efforts conducted by designated agencies.[186] On a procedural level, it is clear that ABAG attempted to comply with the legal standards through sophisticated public participation programs. Among the other features of the program were public ABAG staff presentations to cities and counties around the region, noticed public hearings, and written staff replies to public comments. Despite this, the general public had significant difficulty in gathering sufficient information to understand the mechanisms and their effects on local areas. Adding to this confusion was the fact that contractual time limits made it impossible to produce some documents until the day of a public hearing. Obtaining records of previous decisions made during the interim planning process was also difficult.

Although basic legal standards appear to have been fulfilled, it is worthwhile to question whether this lack of accessibility to materials and the general lack of information as to local impacts of the Plan violated a general public due process right in this type of hearing. The issue can be divided as follows: First, is there a general due process obligation that maximizes the public right of access to this kind of informal rule-making proceeding (i.e., the planning process)? Second, do other specialized statutes (such as CEQA) raise a greater right of this nature than would exist otherwise under the relevant administrative procedure statutes? Finally, should a public access right exist as a matter of basic fairness in long-range planning for regional areas?

THE BASIC STANDARDS: VERMONT YANKEE

The most definitive statement of the public due process of administrative hearings was recently set forth in the Supreme Court case of *Vermont Yankee Nuclear Power Corporation v NRDC* 98 S. Ct., 1197 (1978). The case was brought on the allegation of environmental groups that the failure of the Nuclear Regulatory Commission to hold adjudicatory hearings (with cross examination) during a siting decision violated the rights of citizens affected by the outcome of the hearings. The case, while not entirely on point here (it is federal, and involved a special type of agency), is nonetheless relevant for two basic reasons: First, it sets a general rule for the scope of agency discretion in determining how much attention need be paid to public participation during a hearing process. Second, the case

discusses the legal need for plain language documents to inform the average person of the issues in a complex administrative hearing process.

The first issue — the scope of agency discretion in setting the public role — was clearly in favor of broad agency authority. The Court, in reviewing a contention that the failure to allow for cross examination during the hearings violated rights, stated bluntly that:[187]

> "Absent constitutional constraints of extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge...(their)...duties...." (citation omitted).

The Court did acknowledge that the rights to more formalized proceedings would grow in circumstances of either "great public import" or where a quasi-judicial decision was at stake with the potential to greatly affect a small number of people.[188] The Court, however, pointed out that such circumstances are "extremely rare."[189]

Similarly, dismissing other arguments that due process requires an extensive hearing process, the Court stated that the agency should be allowed to:[190]

> "...Exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence...."

Thus, the case could be read as standing for the proposition that agencies have the freedom to design their own hearing proceedings to meet internally assessed needs and not public rights. In the ABAG case, this would mean that the agency itself had the freedom to use its own judgment as to the need for public input to decision-making.

Beyond this, the Court also dealt with the issue of agency obligation to produce documents that would inform the public of the issues at stake in the hearing.

The Court, while centering around the requirements of the specific statutes at issue, also pointed out that:[191]

> "The basic information to be conveyed to the public is not necessarily a full technical exposition of every facet...(at issue)...but rather a position statement of the agency involved. Therefore it cannot be faulted for dealing with every facet...of the problem."

Absent a deliberate attempt to cloud the issue, and absent public complaint, it again appears that the need for publicly understandable documentation rests in the agency's discretion.[192] Despite the technical nature of Plan documents and the tremendous volume of materials produced, the agency would not have been required to go further than to make enough materials available to the public sufficient to inform interested persons. This does not include detailed materials and access to interpretative facilities such as computer time.

It would appear that ABAG acted in accordance with the general law stated in this case. There remains the problem, however, of the fairness of long-term decision-making for large regions when the bulk of the population is not informed as to the consequences of the agency's decision. To an extent, this issue rests in other relevant statutes, although to a larger extent, it is a public policy issue not easily resolved in a legal analysis.

Statutory Due Process

As stated above, both the Clean Air Act and the Clean Water Act provide for inclusion of the public in the decision-making process.[193] Under both statutes, the formulating agency must evidence a public participation process and hearings on proposed plans in the course of Plan drafting.[194] Under CEQA, public hearings on the adequacy of an EIR are also required, as well as written response to the public comment on the draft Plan.[195] Does this broaden the obligation to include the public in decision-making procedures?

The difficulty in implying a stronger obligation on the basis of these statutes is that while an

expanded policy is present, the details supporting the policy are generally left to administrative discretion.[196] It seems clear that in a situation like the AQMP process where external control requirements are present, the agency's obligation was to attempt to inform the public and not necessarily to succeed in that attempt.

The same rule would appear to apply to the need for plain language documents. Although CEQA mandates the preparation of an EIR which details the effects of a project in a number of areas, the statute does not require that the EIR be readily understandable by the public.[197]

Despite these legal arguments, there may still be arguments about the right of public access in this area that should be pursued.

POLICY INTERESTS IN PARTICIPATION RIGHTS

To some extent, the *Vermont Yankee* holding that there is an expanded due process right for matters of great "public import" may have greater significance from a public policy viewpoint than from a legal analysis.[198] AQMP-type planning may not generate legal results which require exceptional steps to inform the public. However, public policy interests may mandate that such steps be taken. Decisions with potentially far-reaching ramifications for the quality of life in the Bay Area were at stake in AQMP development.

The issue is what limits there should be on this right to be informed. On the one hand, the administrative agency's ability to perform its function argues against the need for the agency to take extraordinary action to inform the public of projects. On the other hand, however, is the real fact that unless the agency takes some steps out of the ordinary, no meaningful public understanding or impact will result. This may entail access to the data base and technology that constituted the grounds for decision-making. It may also involve aggressive media-oriented programs. It may argue against an agency taking on a grant project where the time-frame imposed by the grant contract does not allow for sufficient time to ensure that the public can be adequately informed.

The lesson for similar planning efforts is clear. Success of the planning effort and the system as a whole requires an informed public. That educational task is an essential agency function that cannot be neglected, regardless of the holding of the case law in this area.

THE REVIEW PROCESS: LOCAL AGENCIES

Another procedural characteristic of the ABAG Plan formation process was the lack of substantive guidelines for local agency review and comment on the Plan. This resulted in a lack of consistent review procedures. While some jurisdictions engaged in a comprehensive review of the Plan, allowing for repeated and detailed public comment, others failed to perform more than cursory review. Similarly, some delegates to the General Assembly were instructed after public hearing and a vote of their representative body; other delegates received no guidance or public input.

Although there is no constitutional or statutory evidence that this violated some due process right, the issue does raise another set of questions: did the local government fully meet its responsibilities under the environmental law governing the process?

Clearly, in those jurisdictions where a full review of the Plan was publically made, it would appear that any policy obligation was fulfilled. The general case, however, was a far less detailed consideration than sound public policy would require.[199] The lack of equal protection inherent in the differences between jurisdictions in their treatment of the EMP (while not a valid constitutional argument) seems to argue for the need of specific legislative guidance in this area. Until that time, citizens would not appear to have the ability to compel a complete consideration of such plans.

One mitigating factor in this area is that once the Plan is approved, it must go back to local governments to:

1. Review state changes.

2. Execute management agreements to retain ABAG's lead agency status in the enforcement of the Plan.

It can be argued that these agreements are a "project" in tmmo GII require an EIR and public hearing process. This is clearly an open question, however.

STATE GOVERNMENT ROLE

At the state level, the standards for review of the Plan relate primarily to the ability of the Plan to satisfy federal requirements (although policy considerations will clearly enter the process to some degree). It is worth noting briefly that another characteristic of the process was the State's often inconsistent, and at times inadequate, role in assisting decision-makers.

The problems were clear: State agencies issued unclear and sometimes contradictory documents advising the delegates that one policy or the other would be required for approval — without any showing of the authority justifying such claims.[200] The result was additional confusion as members of policy committees found the decisions rapidly politicized. To an extent, this did not substantially affect the Plan outcome. Yet, it caused a greater degree of polarization in the process, with a resultant decrease in the rationality of the debate. From an optimal planning viewpoint, it seems clear that state (and federal) agencies in this kind of process should have an obligation to provide clear, consistent and coherent advice to the planning entity. Such was not the case in this process.

Substantive Issues in the AQMP Process

It is impossible in this paper to fully describe the technical political and legal factors that shaped the decision to include a given control measure in the AQMP. Aside from the general analysis of the Clean Air Act already undertaken, the best technique for an item-by-item review of Plan considerations lies in a reading of the AQMP itself. Two control measures (or general class of such measures) generated substantial controversy. It is likely to be repeated in other AQMA planning efforts. The measures — land use/development controls and stationary source controls — are highly relevant to the general thrust of air quality planning throughout the United States.

THE LAND USE CONTROVERSY

As was stated above, one of the major changes in the 1977 version of the Clean Air Act was the deletion of the requirements that land use/development controls must be a part of an approvable SIP under Section 110(a)(2)(B). The conference report to the Congress on those amendments indicates that deletion of land use controls and the substitution of new language did not mean that land use controls were prohibited, but that, "preconstruction review of direct sources are to include consideration of energy, environmental and economic impacts and that the only land use regulations which may result from implementation of this Act are those which are needed to assure attainment and maintenance of ambient air quality standards...."[201] Similarly, the conference report indicates that the intent was to deprive EPA of its ability to mandate such controls in the face of a viable SIP demonstrating measures that will result in both attainment and maintenance. The key argument, then, centered on the ability of the EPA to enforce such measures once committed in the Plan.[202] It is important at this point to mention that the utility of land use controls goes primarily to the maintenance of standards in the post 1987 (e.g., attainment extension) period.[203] The belief was that by compacting growth of urban areas, automobile vehicle miles traveled (VMT) would be reduced and consequent emissions reductions could be realized. Local decision-makers, seeking to protect jurisdictional autonomy, focused on the balance between the potential for enforceability and the probable low potential effectiveness of such

measures to achieve the stated purpose. The result was the removal of land use controls from the Plan entirely.

FRIENDS OF THE EARTH v CAREY (FRIENDS III)[204]

A case directly on point in outlining this enforceability problem occurred in connection with New York City's ambitious transportation program for air quality benefits. The case, ***Friends of the Earth v Carey*** (Friends III) involved the city's refusal to implement a transportation program that it had agreed to as part of its air quality commitment. While claiming primarily constitutional protection, it also argued that the measure exceeded the requirements of the Clean Air Act, and that EPA lacked authority to directly enforce the Plan against the local jurisdiction.[205]

This contention was expressly rejected by the Court for a number of reasons. Most importantly, the Court stated that since the City had voluntarily agreed to the Plan, it could not subsequently "attack the Plan on grounds which amounted to an about face of its own endorsement of the Plan."[206] As a policy matter, the Court felt that obligations undertaken by the states would be meaningless unless a higher authority could enforce their commitments.[207] Under Federal law, EPA is that authority and thus has the power to ***directly*** enforce against an offending local jurisdiction.[208]

The lesson in this case for ABAG decision-makers was clear. Even though land use controls were not required by the Act as attainment or maintenance measures, once adopted the federal government would have the authority to step into areas traditionally reserved for local control. The fact that such a measure was adopted by a council of local governments after an extended consideration process would only heighten the ***Friends III*** argument that voluntarily undertaken obligations cannot be later challenged (552 F.2d at 35). Should a jurisdiction then choose to act contrary to the land use/development plan, EPA would then be required to either step in and enforce the Plan, or face the possibility of a citizen suit to compel enforcement under Section 304 of the Act.

Conversely, in the absence of a voluntary undertaking of land use development strategies, it was clear that if the Plan could show attainment and maintenance of standards, then EPA might not have the option of mandating such controls. In ***NRDC v Train***, for example, the Court held that in the face of a plan demonstrating attainment and maintenance, "The Act gives the agency no authority to question the wisdom of a state's choice of emissions limitations," providing they satisfy the requirements of Section 110 (a)(2) 421 US 60,70(1975).

ENFORCEABILITY II: LAND USE CONTROLS

Given this legal background, policy makers examined three separate options for the treatment of land use controls in the Plan. Those supporting the inclusion of controls were mindful of the potential for federal incursion on local government autonomy, if such controls were adopted, but argued that some enforceability was necessary to ensure compliance with the Plan. However, when it became evident that land use controls were highly controversial, other options surfaced. They were:

1. Include land use control strategies fully in the Plan. As stated above, this option was rejected because of the enforceability of such measures and the concern for local autonomy.

2. Include land use controls as a policy, but reserve implementation for either the continuing planning process (CPP) or exclusively to local government. To many decision-makers, this appeared a local alternative. However, others remained concerned that the mere undertaking of the policy would give rise to an unacceptable expansion of federal power over the growth of cities and counties. In an attempt to answer this question, formal inquiry was made of EPA both to the Regional Administrator and the Regional Counsel's office. The answer was not wholly consistent.

The Regional Administrator's response to this concern was direct:[209] In order for a measure to be enforceable, the State must claim credit for the emissions reduction resulting from the measure. The proposed alternative would be, therefore, to adopt a policy without claiming credit for that policy: thus, no jurisdictional effect for the federal agency would result. If credit was claimed, either at the time of adoption or subsequently, then enforcement rights would arise.

The Regional Counsel's office, however, responded in a somewhat less clear manner, and never dealt with the option of not claiming credit for a control measure.[210] The opinion approached the problem by stating that unless adequate control measures are included in the SIP itself, then sanctions could be imposed. The implied support for land use controls in the opinion was evident without shedding additional light on the hard questions facing decision-makers.

3. Place land use controls within the Plan as part of the "identification" of other means to reach attainment. This proposal was also rejected, based upon the concern of decision-makers that any inclusion of land use strategies in the AQMP could lead to potential enforceability. The key to the argument was this: given a viable SIP demonstrating attainment and maintenance in the implementation phases, the probability of enforcement of any given control measure would be low. If substantial problems in meeting standards were to arise resulting in a review of the Plan, EPA (or state authorities) would look first to determine if ***all*** Plan provisions were adequately in force. The inclusion of land use controls in the identification section would appear to establish the voluntary undertaking required by the ***Friends III*** holding for enforceability.

It should be noted that the question of the scope of enforceability is still open — and as such is vested largely in the administrator's discretion. Aside from the problems of direct enforcement, however, delegates to ABAG were conscious of the possibility of the utility of the AQMP as an A-95 review guideline for projects with air quality impacts. Should a project not conform to the land use provisions of the AQMP, it was feared that adverse comments would be filed on the project as a whole, with a negative impact on federal support for the program.

In sum, the land use question was clear: was the loss (or potential loss) of local government autonomy worth the potential air quality benefits of such controls? In the Bay Area, land use strategies could have resulted in achievement of approximately one-half of one percent of the necessary reductions to sustain maintenance standards. Decision-makers chose to reject such controls in favor of identifying other measures to be implemented to fulfill maintenance period requirements.

LAND USE UNCERTAINTIES: SECTION 316

It should be emphasized that the land use issue is far from clearly resolved. Aside from the technical uncertainty inherent in development strategies, the 1977 amendments still leave the requirements for such programs as unsettled as a matter of law. In the 1979 SIP Guidelines, for example, the administrator indicates that to justify an extension of the attainment date for oxidants and carbon monoxide emittants, states must "provide for the evaluation of long-range (post 1982) transportation and growth policies."[211] The statement continues by indicating that "alternative growth policies and/or development patterns must be examined to determine the potential for modifying total travel demand."

Similarly, the Clean Air Act under Sections 316(b)(2) and (b)(4) speaks of the requirement in the placement of sewage treatment plants and of the need to assess "the emissions of any such pollutant resulting directly or indirectly from areawide and non-major stationary source growth (mobile and stationary) in the decision to grant sewage treatment funds. The possibility that land use controls could be a de facto result of these requirements is clear: cities

and counties depend on sewage treatment capacities in determining where growth is acceptable.

Given this possibility, greater clarification of this area of the Act is needed. Although the 1977 amendments allow some interpretation of Congress' intent, the meaning of deletion of land use controls is still open to interpretation.

NEW SOURCE REVIEW

The other major controversy over control measures to be included in the Plan related to the attempt to satisfy Section 110 (a)(2)(D) for controls on new and existing stationary sources (e.g., new source controls). The section provides that an approvable SIP must "include a program to provide for the enforcement of emissions limitation and regulations, as well as regulation of the modification, construction and operation of any stationary source — including a permit program...," as required for both prevention of significant deterioration and non-attainment areas. This preconstruction review program was a major policy instituted in the 1970 version of the Clean Air Act.

The political problem with the provision, however, is its requirement that jurisdictions place controls on a critical sector of local and regional economies. Consequently, regulation to satisfy Act requirements is difficult.

The original ABAG Plan reflected a decision that extremely stringent controls should be imposed on all stationary sources. The way in which this decision was reflected in the Plan demonstrated a substantial confusion with the requirements of the Clean Air Act as amended in 1977 on the part of planners and decision-makers. The net results of the Plan would have meant no construction or expansion of any major hydrocarbon emitting industry after July 1, 1979.[212] The Plan originally required that no emissions be added to the air and that stationary sources must substantially reduce existing emissions levels to a degree some commentators felt impossible to achieve.[213]

ACT REQUIREMENTS

The requirements of the Clean Air Act for non-attainment areas are set forth under Section 172. Areas that will meet the 1982 standards for emissions controls must implement measures that will show attainment of primary standards as "expeditiously as practicable" but, in no case, later than December 30 1982.[214] This means the implementation of all "reasonably available control measures including, at a minimum, reasonably available control technology (RACT)."[215] RACT is defined, under current EPA rules, as the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is "reasonably" available, considering technology and economic factors.[216] Note, however, that neither "expeditiously as practicable" nor the minimal RACT requirements mitigate the fact that attainment must be shown by the target date or the administrator must take enforcement action.[217]

Areas that can show the necessity for an extension for oxidants and carbon monoxide must implement a far more stringent scheme. Current regulations define this obligation as a requirement to impose RACT on existing sources and a standard called "lowest available emission rate" on all new or modified sources (LAER).[218] LAER does not involve an economic feasibility factor, and many commentators have pointed out that the standard has a "technology forcing potential" in mandating the use of conceivable technology that will fit the standard if it exists (or is called for under any other state's implementation plan).

ABAG RESPONSE

Rather than applying these standards, ABAG planners initially chose to call for a different standard that would apply to both new and existing sources — best available control technology (BACT). Although there is a Clean Air Act definition, the ABAG definition reflected a

standard developed by CARB prior to the 1977 Clean Air Act amendments: "best available control technology means the maximum degree of emission control for any air contaminate emitting equipment, taking into account technology which is known but not necessarily in use, provided that...(this shall not be interpreted)...to include...requirements which will result in the closing...or inability to construct a lawful business which could be operated with the application of the best available control technology currently in use."[219] This definition differs sharply from the BACT standard required in the Clean Air Act (for areas that have reached attainment) in that the CARB standard allows for minimal consideration of the availability (or feasibility) of control technology.

Regardless of definition, the ABAG decision represented a misunderstanding of the statutory scheme. To apply this version of BACT to non-attainment areas seeking an extension for oxidants and carbon monoxide would require on the one hand a standard more stringent than required by law for existing sources (RACT) and, on the other hand, a standard less stringent than what is required for new and modified sources (LAER). In point of fact, the proposed standard should have had the effect of destroying any incremental implementation of the Act, with a consequent massive economic impact on existing sources.

THE ABAG COMPROMISE

To resolve this difficult problem of accommodating legal misperceptions with environmental reality, ABAG decision-makers opted for what must be considered a largely semantic solution. The decision was to employ LAER for new sources, combined with a policy of allowing offsets for the cleanup of existing sources in order to allow new construction or modification of sources. This is fully in conformance with the law. For existing sources, however, they decided on a new standard to be called "available control technology" (ACT). The plan language reads as follows:

> "Use available control technology on existing hydrocarbon sources, allowing a reasonable amortization schedule for air pollution control equipment. Available control technology means an emission limitation based on the maximum degree of reduction of hydrocarbons emitted from or which results from any emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for such facility through application of available methods, systems and techniques" (types of such technology listed).[220]

Careful reading indicates that this definition is nothing but a version of the BACT standard defined as it is in the Clean Air Act, (which includes an economic feasibility factor). The provision for reasonable amortization indicates some elements of RACT are present in this definition.

The conclusion is inevitable that the Plan calls for more stringent standards on existing sources than the Clean Air Act itself requires. To implement this Plan, then, will require a reconciliation of the need for expensive control technology (i.e., to reach "maximum reduction") with the need for a consideration of economic and energy impacts as called for under the policy. This may prove a difficult task.

STATUS OF THE PLAN

With the completion of the AQMP at the ABAG level, several key review processes must be undertaken by the state before the Plan is submitted to EPA. Although, as stated above, the state standards for review have not been established, it is clear that the primary state interest is to find a Plan that meets Clean Air Act standards without an undue burden on the economy through overly stringent requirements. Thus far, the Legislature has been examining methods of limiting the State role to one of review and comment, without substantive ability to amend the Plan. However, given the fundamental responsibility vested in states by the Clean Air Act and the regulations, it does not seem likely that basic control for air policy

implementation could be delegated to regional bodies on a wholesale basis. Limited delegation is permissible so long as it "does not relieve the state of its responsibilities" under the Act.

The more critical question at this point concerns the basic approvability of the AQMP — not the issue of who has authority to approve it. It is worth noting that from a technical standpoint, the Plan appears to meet both attainment and maintenance standards of the Clean Air Act, and therefore should be approvable. One open question is the effect on the Plan of the recent passage of Proposition 13 in California — the property tax limitation initiative. The concern centers around the adequacy of assurances that the Plan will be implemented as required by the Act.

ADEQUACY OF THE PLAN: PROPOSITION 13

Under Section 110(a)(2)(F), an approvable SIP must contain "necessary assurances that the state will have adequate personnel, funding and authority to carry out such implementation Plan...." The net effect of Proposition 13 is, of course, to severely limit the amount of funds available to manage various programs. It is relevant to consider whether the passage of revenue limitation measures such as Proposition 13 jeopardize the viability of a plan upon review.

There have been three major cases exploring the question of what constitutes adequacy of assurances that appropriate institutional and financial arrangements will be made to effect a plan. All three rely on the regulations which say that a plan must contain a description of the means and the legal authority to carry it out. This includes under 40 CFR 51.60, written assurances from the governor that a state will seek additional resources as necessary.

Under the holding of *NRDC v EPA* 478 F.2d 875(1973),[221] it was alleged that the Rhode Island SIP failed to provide the necessary assurance that the state would have adequate resources to comply with the 110(a)(2)(F) provisions. This plan, it should be noted, did contain the written descriptions and assurances called for under the AQMA regulations. The Court, while admitting that this was a difficult area to set a standard, held that adequate assurances had been given: "Given the mechanics of state and federal relationships, it is difficult to determine what sort of guarantee the Rhode Island executive could give...."[222] In the end, the Court held it must be left to the "administrator's sound discretion" as to what satisfies the standards of adequacy. This tends to vest greater direct responsibility in the EPA administrator himself: "The administrator can determine whether the itemized resources, together with such federal funds as the administrator may himself channel...will enable the state to carry out the plan."[223]

This holding was duplicated in two other cases that concern Massachusetts[224] and New York SIPs. The New York case is particularly reminiscent of the present California situation. The state claim in that case was that "currently both the state and local agencies...(are)... under tight budgetary restrictions and support for further staff is unlikely...." The Court response was to draw the line based upon the probability that the state will meet its responsibilities.[225] "But, while an affirmative requirement that states will use best efforts is not required, a plan which only provides a negative statement that resources are inadequate cannot be approved...."[226] An indication of state intent appears to be the essential factor that should weigh in the administrator's decision.

The holdings of these cases, while instructive as to the basic standard, leaves open the major post Proposition 13 question: does the Clean Air Act require that the state enact new taxes, if necessary, to implement its SIP? This would seem to be the implication of Section 110(a)(2)(F)(i) and the case law. It seems clear that this would set up a confrontation between largely political considerations, (i.e., the "message" of Proposition 13) and public

policy (i.e., the Clean Air Act) and Tenth Amendment prohibitions against federal mandates intruding on fundamental state areas of authority. The disadvantages of such a conflict for air planning are evident.[227]

Lessons of the ABAG Experience

With this brief survey of the general procedural and substantive issues in mind, it is worthwhile to look at some general criticism of the process as a whole, and explore improvements which could be made in future planning procedures of a similar type. Five basic comments seem to follow most logically from the above discussion:

1. The lack of adequate legal and technical guidance from reviewing agencies (i.e., the state and the EPA) increased the uncertainty inherent in the process. The primary problem in this area, of course, was the lack of published regulations updating the Clean Air Act to meet the new 1977 regulations. Decision-makers were uncertain of the interpretation of mandates in the updated Act — especially after the 1979 SIP Guidelines were circulated. Similarly, there were times when insufficient and inconsistent advice was handed down from those agencies to ABAG (see, for example, the discussion of the land use controversy).

Potential for reform: Although publication of the regulations will occur in due course, it seems as though reviewing agencies ought to recognize an obligation to render sound, consistent advice on difficult technical issues. A structure was established in the ABAG process for joint state/federal/local technical cooperation. However, it did not work to guarantee a steady flow of information to decision-makers at the elected local level. Structural .arrangements are important, but they often break down under severe political pressure. What is more important is the development of clear, concisely written advice that outlines both decided and undecided law with an eye towards options that require political decisions. This would give decision-makers more confidence in the result, especially in tight statutory time deadline situations.

2. Standards for review by local governments were insufficiently detailed, although they meet the basic requirements of the Act. The result was a large degree of variation in public understanding and comprehension of the process. The problem with such inconsistent review tends to undermine public confidence in the results of the process.

Proposed reform: The nature and degree of local agency review of comprehensive planning efforts need further interpretation either from the agency charged with planning or from review agencies at the state and federal level. At the minimum, a hearing on a plan combined with a vote prior to the adoption of said plan would (a) increase public awareness and confidence in the process, and (b) ensure that public review was not dependent on geographic location. Although there is no legal issue to be raised here, there is certainly a policy issue that should be resolved.

3. There was, at times, a lack of adequate time for review of documents. Due to tight contractual time limitations, a review time of several days for a complex planning document is not always adequate for lay audiences. The issue is fundamental fairness of the proceedings.

Proposed reform: Require all documents be available to the public on a basis that would grant an average person a reasonable opportunity to review and digest the materials. This should be a statutory obligation.

4. There was a lack of understanding of the standard to be attained under the Clean

Air Act: No guidance document was ever produced detailing the requirements of the Clean Air Act. The result was confusion over terms and impacts of proposed controls.

Proposed reform: With the issuance of regulations updating the Act's requirements and some exploration of the SIP Guidelines, this problem will naturally be reduced. However, local planning agencies ought to consider the utility of a simple guidance document detailing the structure and operation of the Clean Air Act.

5. The standards of the Clean Air Act itself may be overly stringent. Local agencies should communicate this fact to the Congress for appropriate revision. Under the express terms of the Act, the impact of full implementation of the required measures (especially new source provisions) may well be to force wholesale shutdowns of key economic sectors. Standards ought to be revised to consider (a) their feasibility of implementation, and (b) the net cost/benefit ratio of the imposition of control technologies (as opposed to other health related use of the funds).

It is essential to rethink the standards and required measures of the Act. It has been suggested that the clean air philosophy should be revised from a "zero risk" basis to an intermediate figure that balances economic costs against limited health risks. Such an approach could result in the same net benefit to air quality, but would be achieved in a more incremental, hence "acceptable" fashion.

From a historical perspective, the completion of the ABAG EMP is a significant event in the progress of environmental planning in the United States. The trend in resource management is toward more integrated planning processes as decisions become more complex. To the extent that the EMP represents the development of a mechanism to implement coordinated decision-making, it was successful. However, given the problems inherent in any experiment, the major result of the project may be its lessons for other duplicative planning efforts around the country.

This paper has laid out some of the legal, procedural and substantive parameters by surveying the ABAG process as a whole. Generalizing from the experience may be difficult — every planning experience is as different as the geography of the planning area (both political and jurisdictional). Above all, the major lesson of the ABAG Plan is the need for balance in the planning decisions at all levels. This balance will mean more meaningful progress towards meeting the critical environmental and economic needs of the country.

1. ABAG, *Environmental Management Plan Work Program*, 7, April 1976 (hereinafter Work Program)

2. Reference to the Act in this paper includes reference to the Clean Air Act Amendments of 1970, and its predecessors as amended by the Clean Air Act Amendments of 1977, 95 Stat. 685, et. seq., August 7, 1977.

3. For example, at the time the final AQMP was approved by ABAG, EPA had not issued updated regulations reflecting the 1977 amendments, *Id.*

4. References to the California Environmental Quality Act (CEQA) refer to California Public Resources Code, Sections 21000 *et. seq.* (1970)

5. References to the Federal Water Pollution Control Act. Purposes of discussion refer to 1251 *et. seq.*, the Federal Water Pollution Control Act of 1972 as amended by the Clean Water Act Amendments of 1977, 33 USC 1251, *et. seq.*

6. It is also true that the use of transportation control strategies was an important issue in the process. Because there were no particular innovative outcomes from the debate, this aspect is not substantially discussed.

7. *Supra*, note 2.

8. Joe Bosselman, *The Permit Explosion*, 81, Urban Land Institute, Washington, D.C. (1976)

9. The Association of Bay Area Governments covers nine counties surrounding the S.F. Bay.

10. *Supra*, note 8, at 15, 16.

11. *Supra*, note 1, at 2.

12. *Id.*, at 15.

13. *Supra*, note 5, see also *supra*, note 1 at 2.

14. *Supra* note 1 at 15.

15. See *Supra* note 2, at Section 110 (a)(1) and 33 USC 1288 (referred to in this paper as "Section 208" of the Federal Water Pollution Control Act).

16. *Supra* note 2, at Section 101 (b).

17. *Id.*, at Section 108

18. *Id.*, at Section 110 et. seq.

19. *Id.*, Section 110 et. seq.

20. *Id.*, at Sections 113, 120, 167, 172, 304 and 316.

21. *Id.*, Section 101 (a)

22. Brattain, Robert, "Ambient Air Quality: Goals or Gods." Prepared for the Coalition of Labor and Business (COLAB) of Alameda and Contra Costa Counties at (b) (1977).

23. *Supra*, note 2 at Section 101 (a)(3)

24. See, for example, the series of Natural Resources Defense Council Cases challenging approval of state plans: e.g., *NRDC v Train* 396 F. Supp. 1386 (1975), *NRDC v Train* 421 US. 60, 75, 87 (1975).

25. See for discussion Kraser, Bruce "Economics, Technology and the Clean Air Act of 1970: "The First Six Years" 6 Ecology L. Quarterly 161 (1976)

26. *Id.*, at 172: see also *Friends of the Earth v Carey* 98 S.Ct. 4, *Supra* note 202.

27. *Supra*, note 2, at section 109

28. *Id.*, at Sections 109 (a)(J)(B)

29. *Id.*, at Section 111

30. *Id.*, at Sections 112, 202

31. *Id.*, at Section 109(a)(2)(b)(1); (b)(2)

32. 40 CFR 52.220

33. *Id.*, at 82.21

34. *Id.*, at 53.69

35. *Supra*, rule 2 at Sections 110, 172.

36. *Id.*, at Section 110 (a)(1)

37. See, for example, 110(c)(1) discussed below in detail.

38. *Id.*, at Section 110 (a)(2)

39. *Id.*, at Section 110 (a)(2)(B)

40. *Id.*, at Section 110 (a)(2)(C)

41. *Id.*, at Section 110 (a)(2)(B)

42. *Id.*, at Section 110 (a)(2)(i)(CI,(CII)

43. *Id.*, at Section 110 (a)(2)(F)

44. *Id.*, at Section 110 (a)(2)(G)

45. *Id.*, at Section 110 (a)(2)(H)

46. *Id.*, at Section 110 (a)(2)(H)

47. *Id.*, at Sections 107, 110

48. Re: controversy over the need for "extraordinary" measures to follow from Section 172 (a)(1) and the statement that standards shall be attained by target dates.

49. *Id.*, at Section 172 (a)(1)

50. *Id.*, at Section 172 (a)(2)

51. *Id.*, at Section 172 (b)(2)

52. *Id.*, at Section 172 (b)(3)

53. *Id.*, at Section 172 (b)(4)

54. *Id.*, at Section 172 (b)(5)

55. *Id.*, at Section 172 (b)(6)

56. *Id.*, at Section 172 (b)(7)

57. *Id.*, at Section 172 (b)(8)

58. *Id.*, at Section 172 (b)(9)

59. *Id.*, at Section 172 (b)(10)

60. *Id.*, at Section 172 (a)(1)(2)

61. *Id.*

62. *Id.*, at Section 172 (1)(11)(A)

63. *Id.*, the major requirement is a consideration of alternate sites and facility types.

64. *Supra*, note 2 at Section 172 (b)(11)(B)

65. *Id.*, at Section 172 (b)(ii)(C)

66. *Id.*, at Section 110 (c)(1)

67. *Id.*

68. *Id.*, at Section 173 (i)(B)

69. *Id.*, at Section 316. Note also the potential for indirect source controls

69. *Id.*, at Section 316. Note also the potential for indirect source controls in this section.

70. *Id.*, at Section 113

71. *Id.*, at Section 304

72. The precise language is "emissions, limitation schedules and timetables for compliance and other such measures as may be necessary to assure attainment and maintenance of such...standards including, but not limited to, *transportation controls, air quality maintenance plans and reconstruction review of direct sources of air pollution.*" The added material (italicized) was a substitute for the term land use in the Clean Air Act of 1970. Cong. Rec., daily ed. at H.8542, August 3, 1977.

73. *Supra*, note 2 at Section 110 (a)(5)(A)(i)

74. *Id.*, at Section 110 (c)(2)(13)

75. See present 40 CFR 50.00 et. seq.

76. Hereinafter referred to as "Guidelines"

77. Guidelines, cover letter page 2

78. *Id.*

79. *Id.*, at 3

80. *Id.*, at 10 e.g. "Provides for the evaluation of long range (post 1982) transportation and growth policies." The section, while not impermissibly requiring imposition of land use controls, nonetheless raises the question of the necessity for such controls. The cover letter, for example, discussed the need for "ambitious measures" to alter transportation patterns — a traditional use of land use controls.

81. *Supra*, note 76 at 1

82. *Id.*, at 2

83. *Id.*, at 4

84. *Id.*, at 2

85. See below

86. The guidelines state only that such measures need be adopted "in order to provide for attainment." Whether the failure to adopt such measures prior to SIP submission would be grounds for disapproval is not stated.

87. *Supra*, note 76 at 3

88. *Id.*, at 4

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*, at 5

93. *Id.*

94. *Id.*, at 6, "A commitment by a responsible government official..."

95. *Id.*, at 5, 6

96. *Id.*, at 6

97. *Id.*, at 8

98. See, for example

99. *Supra*, note 72 at 10. See also note 80.

100. See, for example, Cong. Rec. duty ed. at H8542 (August 3, 1977) and the staff of the subcommittee on Environmental Pollution of the Committee on Public Works, a Section by Section Analysis of S.252 and S.253 Clean Air Act Amendments (1976) at 3.

101. Housing Act of 1954, as amended Section 707, P.L. 92-213: Tital 40-461

102. *Id.*

103. *Id.*

104. *Supra,* note 77

105. Los Angeles may be a prime instance of this.

106. Heis, Keys, Robbins, "Regional Governmental Arrangements in Nine Metropolitan Areas" EPA 600 15-74-024 (1974) at 6.

107. *Supra,* note 1 at 49

108. *Id.*

109. Much of this information is based on the author's attendance at EMTF meetings 1/11/78, 1/23/78, 2/16/78, 2/22/78, 3/16/78 and reflects personal observation.

110. *Supra,* note 1 at 369

111. *Id.,* at 49

112. *Id.,* at 45

113. Reference to "A-95" refer to Office of Management and Budget. Circulation A-95; August 24, 1969 and appears in Sect. 401 of the Inter-Governmental Cooperation Act 42 USC A 4231 (1968)

114. *Supra,* note 1 at 45

115. *Supra,* note 4.

116. California Environmental Quality Act, Pub. Res. Code, Section 21092 et seq.

117. *See,* for example, Work Plan. Supra note (a) 389 et seq.

118. *See,* for example, Solano Board of Supervisors letter to ABAG included as part of the work plan, supra, note 1 at 391-394.

119. A structural entity offer called for by commuters; See, for example, He(i) Supra, note 106 at 205.

120. OMB, *Supra,* note 113

121. *Id.*

122. *Id.*

123. *Id,*

124. *Id.*

125. Bosselman, Supra, note 8 at 8

126. CEQA, *Supra,* note 4 at Sect. 21083

127. National Environmental Policy Act, Pub.Law 94-52 as amended by Public Law 94-83.

128. *Supra,* note 2 at Section 110 (a)(2)(C)

129. *Supra,* note 5, Section 1288 (b)(2)(A)

130. *Id.,* at Section 1288

131. *Id.,* at Section 1281

132. *Id.,* at Section 1288 (a)(2)

133. *Id.,* at Section 1288 (b)(2)(A)

134. *Id.,* at Section 1288 (b)(2)(b)(E)

135. *Id.,* at Section 1288 (b)(2)(c)(ii)

136. *Id.*

137. *Id.,* at Section 1288 (b)(3)

138. *Id.,* at Section 1288 (f)(1)

139. *Gonzales et al. v Costle et al.,* No. C76 2039 (9th Cir., 1978)

140. Due by October 1, 1978. 33 USC 1288 f(2)

141. *Supra,* note 2 at Section 174 (a), 172 (b)(a)

142. *Supra,* note 5 at 1288 (b)(2)(A-K)

143. CEQA, Supra, note 4

144. *Id.,* at Section 21068. Significance is defined to mean a "substantial or potentially substantial adverse change in the environment."

145. *EDF v Coastside County Water Dist.* 104 Cal Rptr. 197 (1972)

146. CEQA, Supra note 4 at 21065.

147. *Id.,* Section 21080, 21151

148. *Id.,* Section 21151, 21082, 21165

149. *Id.,* Section 21092, 21105, 21108

150. *Id.,* Section 21153, 21165

151. *Id.,* Section 21165

152. Cal. A. 2d 444

153. *Id.,* at 446, 447

154. *Id.,* at 447

155. *Id.,* at 448

156. 8 Cal 3d, 247, 259

157. Citing *No Oil v City of Los Angeles,* 13 Cal 3d, 68, 75

158. Supra, note 151, at 447

159. *Id.,* at 448

160. *Id.*

161. General Assembly Meeting, June 10, 1978, Ruling of Arthur Evans, Esq. Attorney for ABAG

162. CEQA, Supra, note 4 at 21167

163. *Id.,* at Section 21000

164. *Supra,* note 138

165. *Id.,* at exhibit B. Letter to Administrator of EPA raising initial claims

166. *Id.*

167. *Id.,* at 2

168. *Id.*

169. Citing 33 USC 1251 (a)(1)

170. *Supra,* note 138 at II

171. *Id.*

172. *Id.,* at 6

173. *Id.,* city, for example, solid waste Peevey Act 42 USC, 6705(b)

174. 396 F. Supp.1888 (D.D.C.1975). See also 396 F. Supp. 1393 (1975)

175. *Id.*

176. *Id.,* at 1387

177. Also citing *US v Menasche* 348 U.S., 528,529

178. 417 F Supp, 939; also see 31 USC 628; 21 Ops. Atty.Gen. 420 (1896)

179. *Supra* note 138 citing; State Water Resources Control Board Memorandum #3 (July 8, 1977)

180. *Supra,* note 138, Defendant's Joint Trial Brief at 3.

181. *Id.,* citing H. Report 92-911 p.95 (1975)

182. *Id.,* at 5

183. *Id.*

184. *Id.,* citing Public Resources Code Section 21081

185. *Id.,* Plaintiff's Joint Trial Brief at 3.

186. *Supra,* note 2 at Section 172 (f)(9); also, Supra, note 4 at 1365, etc.

187. 55 L. ed. 478 (1978)

188. *Id.*

189. *Id.,* at 479

190. *Id.,* at 480

191. *Id.,* at 480,481

192. *Id.*

193. *Supra,* note 185

194. See, for example, 40 CFR 130 et. seq.

195. CEQA, Guidelines, Cal. Admin. Code, Section 15146

196. *Supra,* note 186

197. See, for example, CEQA, supra note 9

198. *Supra,* note 187

199. Author's own viewpoint

200. See, for example, letter from Bill Lockett, Chief, California Air Resources Board Planning Section to Dianne Feinstein 4/11/78.

201. Cong. Rec., daily ed. at H8542, August 3, 1977.

202. *Id.*

203. Draft Environmental Management Plan, UI-117 (herein DEMP)

204. 552 F. 2d, 25 (2nd circa 1977); stay of enforcement denied, 98 .ct. 4 (sup. Ct. 1977), cert. den. 54 L.Ed. 2d 188 (1977) *Friends III*

205. *Id.,* at 34

206. *Id.,* at 34

207. *Id.,* at 34

208. *2Id.*

209. "Statement of Paul De Falco," Regional Administrator, Region IX, Federal Environmental Protection Agency, 3/6/78

210. Karp, Irwin, "Memo to Paul De Falco" re: The Clean Air Act

211. *Supra,* note 78 at 10

212. See statement of California Council for Environmental and Economic Balance "Position on the EMP" at 21 (February, 1978)

213. *Id.*

214. *Supra, note 2 at Section 172 (a)(1)*

215. Id., at 172 (b)(2)

216. *Supra,* note 2, Section 173

217. The language of the Act reads, "...attainment of such...standards are as expeditiously as possible...but not later than December 31, 1987

218. *Id.,* at Section 173(2)

219. *Supra,* note 2 at Section 172

220. See California Air Resources Board Resolution 77.53 December 20, 1977

221. See Air Quality Maintenance Plan recommendation for Executive Board at 1 (4/25/78)

222. 5 ERC 1879 (1973)

223. 478 F2d at 881

224. *Id.*

225. *Id.,* (cases were consolidated for decision)

226. *Id.*

227. The other issue in California is, of course, the fact that the Governor of the State has stated he will not raise taxes. Does this mean that EPA (i.e., the federal government) is attempting to force the state to act on a "state function." If so, the 10th Amendment issues become critical.

CALIFORNIA COUNCIL for ENVIRONMENTAL & ECONOMIC BALANCE

215 Market Street • Suite 930
San Francisco, CA 94105